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OCTOBER TERM, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, et. al.,
Appellants,

v.

ESSIE B. BURNEY,

Appellee.

**On Appeal From The United States District Court
For The Northern District of Indiana
Fort Wayne Division**

Brief of Appellee

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Brief of Appellee

QUESTIONS PRESENTED

1. Whether the Indiana unemployment compensation procedure, which suspends the payment of unemployment compensation benefits to eligible recipients for several months pending an evidentiary hearing, violates the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. § 503(a)(1) and (3).

2. Whether this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970) that a state must afford adequate notice and an evidentiary hearing prior to suspending or termi-

nating vitally needed government benefits applies to the state termination of unemployment compensation benefits, which this Court has found serve "to maintain the recipient at subsistence levels." *California Department of Human Resources Development v. Java,* 402 U.S. 121, 131-32 (1971).

STATEMENT OF THE CASE

This action was originally filed in the United States District Court by plaintiff Ronald M. Hiatt representing a class of persons who applied for unemployment compensation benefits, were determined eligible by the Indiana Employment Security Division [hereinafter the "Division"], and whose benefits subsequently were suspended pending an evidentiary hearing on an employer's appeal challenging their initial eligibility. The issue presented by plaintiff Hiatt was identical to the issue decided by this Court in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), which held that such suspensions violate the Social Security Act's requirement that state unemployment benefits be paid "when due". 42 U.S.C. § 503(a)(1). The court below ruled in favor of plaintiff Hiatt and his subclass on the basis of *Java,* and the Division has not appealed from that portion of the decision.

This appeal concerns the issues presented by an intervening plaintiff, Essie B. Burney, and the subclass she represents who applied for unemployment compensation benefits, were determined eligible by the Division, and whose benefits subsequently were suspended pending an evidentiary hearing on the question of their continued eligibility. The court below held that recipients such as Mrs. Burney in continued claim status were within the purview of *California Department of Human Resources De-*

velopment v. Java, supra, and it enjoined the termination of their benefits without a prior evidentiary hearing.[1]

Mrs. Burney and her class are wage earners who involuntarily lost their last jobs and have not yet secured new employment.[2] Prior to their loss of employment, they earned sufficient wages in employment covered by the Indiana unemployment compensation program to qualify for the receipt of unemployment benefits. They filed unemployment compensation claims and, after a lengthy investigation by the Division,[3] were determined eligible for a set amount of benefits payable over a fixed number of weeks.[4] They were scheduled for periodic interviews by a Division official, usually at five or ten week intervals, and thereafter began to receive benefit checks each week.

Sometime following the initial determination of eligibility, their benefits were suspended by a Division official for allegedly no longer meeting continued eligibility requirements. Disputing their suspensions, they requested an

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1. As used in this Brief, the terms "evidentiary hearing" and "due process hearing" refer to a hearing procedure that affords timely and adequate prior notice, the right to appear personally and through counsel, an opportunity to present evidence and to confront and cross-examine adverse witnesses, and a decision by an impartial decision-maker based solely on the evidence adduced at the hearing. This is not a judicial-type hearing (Division Brief [hereinafter "Div. Br."] at 18), but instead an "evidentiary hearing" as that term was used by this Court in Goldberg v. Kelly, 397 U.S. 254, 260, 267-71 (1970).

2. *See* IND. ANN. STAT. §§ 52-1538a-b, 52-1539 (Burns 1964 Repl., 1972 Supp.).

3. The Indiana procedure for determining *initial* eligibility is identical to the California procedure described in detail in California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971). *See* INDIANA EMPLOYMENT SECURITY DIVISION, UNEMPLOYMENT COMPENSATION CLAIMS MANUAL [hereinafter "MANUAL"] § 13000 et seq.

4. *See* IND. ANN. STAT. § 52-1542a(a) (Burns 1964 Repl., 1972 Supp.); MANUAL § 13100.

evidentiary hearing before a Division Appeals Referee. IND. ANN. STAT. § 52-1542a(e) (Burns 1964 Repl., 1972 Supp.). Several months later[5] a Referee hearing was held at which time they were afforded prior notice, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and a written decision by an impartial decision-maker based solely on the evidence adduced at the hearing. On the basis of the evidence at this hearing, nearly half of the recipients who appealed their suspensions were found to have been fully eligible.[6] Their improperly withheld benefits were then paid to them retroactively in a lump sum.

Plaintiff Burney, for example, lost her job in late December, 1970. On January 7, 1971, she was initially found eligible for a total of eight hundred and seventy-five dollars in unemployment benefits payable over a period of twenty-two weeks at the rate of $40.00 per week. Following a periodic five-week interview, her benefits were summarily suspended for an indefinite period beginning with the week ending March 27, 1971. The Division gave the following reasons for her suspension:

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5. In the calendar year 1971, over 72% of claimant appeals were still undecided after 75 days. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 17a at 12 (March, 1972). From January-March, 1972, over 63% of claimant appeals were undecided after 75 days. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 17 at 9 (May, 1972).

6. In the calendar year 1971, 45.9% of the termination decisions appealed by recipients were reversed by Referees. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18a at 14 (March, 1972). The most recent statistics filed by the Division with the U.S. Department of Labor reveal that the reversal rate has jumped to 49.2% in the first quarter of 1972. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18 at 10 (May, 1972).

> Because the claimant is limiting and restricting the hours for which she is available for work, she is being held as not available for work as of week ending 3-27-71 and until such time as she enters the labor market and becomes available for all shifts of work.

Appendix at 32.

The Division's action was based on Mrs. Burney's alleged refusal of a job offer at the Melting Pot Restaurant in Fort Wayne, Indiana. The Division admits that Mrs. Burney was not afforded a due process hearing prior to the termination of her benefits. (Defendants' Response To Request For Admissions, No. 16 at 4).

On April 2, 1971, Mrs. Burney appealed her suspension and requested an evidentiary hearing before a Division Referee. She contended that she was not obligated to accept the job at the Melting Pot Restaurant because she would have been required to work on the 5 p.m. to 2 a.m. shift; she did not have a car and public buses stopped running at midnight; she had never worked a night shift; she could not find a babysitter for her minor children for such late hours; and she was making an independent effort to secure work on a day shift or earlier night shift.[7]

Faced with the total loss of unemployment compensation during the months pending the decision on her appeal, Mrs. Burney filed a motion to intervene in this action on April 27, 1971. She contended that the Division's practice of suspending unemployment benefits without a prior evidentiary hearing violated her rights and those of her class under the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. § 503(a), and the due process clause of the Fourteenth Amendment.

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7. *See* In the Matter of Burney, Ind. Employment Security Div. Review Board, Case No. 71-R-297 (Dec. 6, 1971).

On May 7, 1971, the court below granted Mrs. Burney's motion to intervene and issued a temporary restraining order reinstating her benefits. The court found:

> . . . the continued withholding and termination of unemployment compensation insurance benefits will deprive the intervening plaintiff of the source of income necessary to meet her food, clothing and shelter needs.

On July 1, 1971, an evidentiary hearing was held before a Division Referee on Mrs. Burney's appeal. A decision affirming her suspension was issued on July 13, 1971, some 102 days after she originally filed her request for a hearing. She subsequently appealed to the Division Review Board, and, on December 6, 1971, the Board reversed the Referee, holding that the evidence at the Referee hearing showed that her benefits had been erroneously suspended. The Board found that she neither had been unavailable for work nor had turned down a suitable work offer.

On October 27, 1971, the three-judge district court held that the suspension of unemployment benefits without a prior evidentiary hearing violated the provision of the **Social Security Act requiring that unemployment compensation be paid "when due". Pursuant to the lower court's order, unemployment compensation recipients in Indiana are presently being afforded the opportunity for an evidentiary hearing prior to the suspension of their benefits.**[8]

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8. The Division's suggestion that the order of the court below requires a full evidentiary hearing for every continued claim recipient every week (Div. Br. at 19) is absurd. Under the procedure now in effect in Indiana pursuant to the lower court's order, an evidentiary hearing is required and is given only to recipients whom the Division seeks to terminate and who request such a hearing. *See* Claims Manual Transmittal Letter No. 430 implementing lower court order. Naturally, the Division need not provide an evidentiary hearing to those recipients whose continued eligibility is not in question. *Id.*

It is well to clarify at the outset the limited scope of the questions presented herein. Despite the Division's assertions to the contrary (Div. Br. at 13), this case, as the court below pointed out,[9] raises no issue concerning the procedural safeguards to be afforded persons whose initial claims for unemployment benefits have been rejected. The unemployed workers whose rights are here at issue have been investigated by the Division[10] and ruled eligible for unemployment benefits for a fixed number of weeks. They have been specifically placed by the Division in a "continued claim" category. *See* MANUAL §§ 13620, 13720-32. This factual situation is markedly different from that of a claimant whose entitlement to benefits has never been officially established.

SUMMARY OF ARGUMENT

I

In enacting the Social Security Act, Congress intended unemployment compensation to serve three distinct purposes: (1) to enable workers to survive temporary periods of unemployment without having to resort to relief, (2) to help workers find reemployment and (3) to maintain the purchasing power of the unemployed, thus stabilizing consumer demand. To achieve these objectives, state unemployment compensation procedures must be designed to provide "early substitute compensation during unemployment." *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971). In order to assure that benefits are paid in a timely fashion, the Act provides that State unemployment procedures "be reasonably calculated to insure full payment of unemployment

9. *See* Jurisdictional Statement [hereinafter "J.S."] at A-10. The lower court's opinion is reproduced at J.S. pages A-1—A-11.

10. *See* California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971).

compensation when due." 42 U.S.C. 503(a) (1). For benefits to be paid "when due", they must not only commence promptly once an unemployed worker is determined initially eligible for a fixed number of weeks, *see Java, supra,* but also must be paid regularly throughout his fixed period of eligibility until such time as he has been properly found to be no longer eligible for them. Only a procedure that provides an opportunity for an evidentiary hearing *before* benefits are suspended insures *eligible* unemployed workers the continuous payment of unemployment compensation "when due."

Although a recipient has been found initially eligible for unemployment compensation for a fixed number of weeks, his benefits may be abruptly suspended on the basis of an informal interview. He then receives no benefits for many months pending an evidentiary hearing before a Referee. If the Referee finds that the suspension was erroneous—as occurs in virtually one half of all cases—the eligible unemployed worker receives his benefits retroactively in a lump sum. Since the average length of time an unemployed worker is entitled to receive compensation is 11 weeks, a recipient whose payments have been wrongfully suspended in a summary manner usually receives no benefits until a time in which he is no longer qualified for unemployment compensation. In the interim, he is forced somehow to survive without the use of "sustaining funds." *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967).

By assuring that a large number of eligible employees do not receive benefits until long after the "short-term" period in which the Division concedes unemployment compensation must be paid (Div. Br. at 14), the Indiana summary suspension procedure undermines all three objectives of the federal statute. The court below properly held, therefore, that the Indiana procedure was not "reasonably calculated to provide full payment of unemployment compensation when due." 42 U.S.C. 503(a) (1).

The Social Security Act further requires that the Division afford a "fair hearing" to unemployed workers whose benefits it seeks to suspend. 42 U.S.C. 503(a) (3). To accomplish the purposes of the unemployment compensation program, this hearing must be held before benefits are suspended. Only a prior "fair hearing" insures the regular flow of benefits to eligible workers—which "is what the unemployment insurance program was all about." *Java, supra,* 402 U.S. at 135.

II

The principal objective of the Fourteenth Amendment's requirement of procedural due process is to prevent the erroneous deprivation of property rights. The shocking rate at which the Division's summary suspension procedure improperly deprives *eligible* recipients of vitally needed unemployment benefits provides a classic illustration of why this Court has repeatedly held that notice and a prior evidentiary hearing are the usual requisites of procedural due process. Unemployment compensation terminations present an even more compelling case for a prior evidentiary hearing than did the welfare terminations at issue in *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Like welfare, unemployment compensation provides "subsistence" benefits, furnishing cash to an unemployed worker "at a time when otherwise he would have nothing to spend." *California Department of Human Resources Development v. Java,* 402 U.S. 121, 132 (1971). While providing greater dignity and security than public assistance, the unemployment compensation program was specifically designed by Congress to afford the same protection for the "working poor" that welfare provides for its beneficiaries. Empirical data confirms that in the absence of unemployment benefits the unemployed worker is without sufficient

assets to tide himself over a period of unemployment. Except in an extremely unusual case, he is categorically ineligible for welfare assistance. Since, by definition, he is involuntarily unemployed, the eligible recipient has no ready alternative source of "sustaining funds." *Nash v. Florida Industrial Commission, supra.* Thus, as in *Goldberg,* the "crucial factor" of need pervades this case.

Even more than in the case of welfare, however, the complex factual issues presented in unemployment compensation termination cases make a prior evidentiary hearing essential to an accurate decision. Unemployment cases involve the application of diverse statutory requirements to a plethora of factual situations. Third party information often plays a decisive role. Under these circumstances, such due process elements as timely and adequate notice detailing the reasons for a proposed termination, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and a written decision by an impartial decision-maker are particularly necessary to protect unemployed workers from the wrongful deprivation of benefits.

No overriding state interest necessitates the use of a summary procedure to terminate unemployment compensation. Potential losses to the Employment Security Fund as a result of providing prior evidentiary hearings are *de minimis.* Unlike welfare, the state has ample powers to recoup unemployment overpayments. Since the implementation of the lower court's order, the intergration of a prior evidentiary hearing into the Division's termination procedure has proved to be efficient and workable.

Nothing in the nature of unemployment compensation renders the *Goldberg* rationale inapplicable to the present case. Both welfare and unemployment recipients occupy an identical eligibility status. Following an initial determina-

tion of eligibility, recipients in both programs must report regularly and perform certain affirmative duties to maintain their continued eligibility. For example, both programs require that continued recipients seek work and accept offers of employment.

Nor are the interests of employers adversely affected by providing recipients an evidentiary hearing prior to terminating benefits. If at the evidentiary hearing or at any subsequent stage it is determined that a recipient is no longer eligible for benefits, his former employer is relieved of all liability for any benefits paid to the recipient in the interim.

This Court's decision in *California Department of Human Resources Development v. Java, supra,* that unemployment benefits may not be summarily suspended pending an employer's appeal in no way renders *Goldberg* inapposite. In *Java,* the Court dealt with procedures for establishing *initial* unemployment eligibility. Entirely different standards apply when the state seeks to divest a recipient of a statutory entitlement that he previously has been enjoying.

Unemployment compensation is a worker's earned "contractual right" to benefits which his labor helped to create. *Java, supra,* 402 U.S. at 131. He relies on its availability should he become involuntarily unemployed. Due process does not permit its termination without a prior evidentiary hearing.

ARGUMENT

I

THE SUMMARY SUSPENSION OF UNEMPLOYMENT COMPENSATION BENEFITS FOR SEVERAL MONTHS PENDING AN EVIDENTIARY HEARING VIOLATES THE "WHEN DUE" AND "FAIR HEARING" REQUIREMENTS OF THE SOCIAL SECURITY ACT.

This Court, like the court below, can decide this case without reaching the constitutional question of whether

the Fourteenth Amendment requires an evidentiary hearing prior to the suspension of unemployment compensation benefits. *Compare California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971). Indeed, a finding that such a hearing is required by statute would be in line with this Court's practice of liberally construing statutory requirements in order that delicate constitutional issues of procedural due process need not be reached. *See Greene v. McElroy*, 360 U.S. 474, 507-08 (1959); *Wong Yang Sun v. McGrath*, 339 U.S. 33, 48-51 (1949).

Section 303(a) of the Social Security Act, 42 U.S.C. § 503(a) provides:

> The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment compensation statutes] to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—
>
> (1) such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . .
>
> (3) opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

An examination of the statutory purposes of the unemployment compensation program, as revealed both in the legislative history and judicial interpretation of the Social Security Act, compels the conclusion that, under the "when due" and "fair hearing" requirements, recipients must be provided with a full opportunity to be heard before the

suspension of their benefits.[11] In enacting the unemployment compensation program, Congress sought to achieve three principal purposes: (1) providing sustenance and security to unemployed workers without relegating them to public assistance; (2) helping unemployed workers to find employment substantially equivalent to their former jobs; and (3) maintaining the purchasing power of the unemployed, thereby stabilizing consumer demand and sustaining the economy. *See generally California Department of Human Resources Development v. Java,* 402 U.S. 121, 130-33 (1971). To achieve these purposes, Congress must have intended a hearing procedure that insures that payments are made to workers at a time in their unemployment cycle when such goals would be facilitated rather than frustrated. For this end to be accomplished, payments must not only commence promptly when a worker is unemployed, *see Java, supra,* they must also continue throughout the period of unemployment until such time as he is properly found to be no longer eligible for them. Only a "fair hearing" held before benefits are suspended can assure eligible unemployed workers full payment of unemployment compensation "when due". 42 U.S.C. § 503(a).

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11. It is clear that this Court has power to review the issue of whether the Division's procedures comply with the Social Security Act, regardless of administrative approval of those procedures by the Secretary of Labor. *See* California Department of Human Resources Development v. Java, 402 U.S. 121 (1971); Rosado v. Wyman, 397 U.S. 397, 420-23 (1970); King v. Smith, 392 U.S. 309 (1968). In Java, *supra,* the Secretary had not only approved the challenged procedure but also submitted a brief amicus curiae arguing that it conformed to the provisions of the Act. This Court, citing Rosado v. Wyman, 397 U.S. 397, 420-21 (1970), nonetheless reviewed the issue independently and held that the California procedure violated the Act. Java *supra,* 402 U.S. at 135. It rejected the argument advanced by California that the administrative approval of the procedure by the Secretary of Labor precluded judicial review. *See* California Department of Human Resources Development v. Java, *supra,* Brief of Appellants at 10.

A

BY SUSPENDING UNEMPLOYMENT BENEFITS FOR SEVERAL MONTHS WITHOUT A PRIOR EVIDENTIARY HEARING ON CONTINUED ELIGIBILITY, THE DIVISION DEFEATS THE OBJECTIVES OF THE SOCIAL SECURITY ACT AND VIOLATES THE "WHEN DUE" REQUIREMENT.

1. By Causing Substantial and Unnecessary Delay in the Payment of Benefits to Eligible Recipients, the Division's Summary Suspension Procedure Fails to Insure the Full Payment of Unemployment Compensation "When Due".

Section 303(a)(1) of the Social Security Act provides that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). In *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971), the Court found that under this provision of the Act, unemployment benefits become "due" after the initial eligibility determination—"the critical point in the [unemployment compensation] procedure." 402 U.S. at 127. Based upon this finding, the Court held unlawful the summary suspension of an unemployed worker's benefits pending an employer's appeal. Since the summary suspension of benefits frustrated the Congressional objective of providing "early substitute compensation during unemployment," the Court held that it violated the Social Security Act's "when due" requirement. 402 U.S. at 133.

The continued claim recipients in this case, like the recipients in *Java*, have been found initially eligible for benefits for a fixed number of weeks, yet they receive no benefits pending an evidentiary hearing on their continued eligibility. Indeed, the delay pending the hearing is so long that the great majority of eligible suspended recipients are already back at work by the time they received their benefits. In 1971, the average length of time an unemployed worker in Indiana received unemployment benefits was eleven weeks. *See* THIRTY-SIXTH ANNUAL REPORT OF THE

INDIANA EMPLOYMENT SECURITY BOARD, EMPLOYMENT SECURITY IN INDIANA 1971 at 55 (March 30, 1972) [hereinafter "ANNUAL REPORT"]. Since 72% of appealed suspensions were not decided within an eleven week period (75 days),[12] the overwhelming proportion of unemployed workers whose benefits were wrongfully suspended eventually received them at a time when they no longer qualified for *current* payments. Thus, in the event his benefits are summarily suspended, an *eligible*[13] worker may receive no weekly benefits when he is unemployed and in desperate need of income,[14] only to receive a lump sum payment many months later when he is already back at work.

Faced with an identical summary suspension procedure but a much shorter period of delay pending the Referee decision, a three-judge district court in *Wheeler v. Vermont*, 335 F. Supp. 856 (D.Vt., 1971), reached the same conclusion as the court below and held that the procedure violates the Social Security Act. As Judge Oakes stated:

> We thus face the question whether this procedure falls without the federal statutory mandate of § 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), that the state method of administration be "reasonably calculated to insure full payment of unemployment compensation when due." *See California Department of Human Resources v. Java, supra; cf. Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970), *aff'd after remand*, 402 U.S. 991 (1971); *King v. Smith, supra* at 317, 333. The evidence here shows that on the average it takes approximately 37.5 days from a time a claimant appeals from a Claim Examiner's determination until the Appeal Referee's decision is rendered. This delay

12. *See* note 5, *supra*.

13. Almost 50% of the unemployed workers who appeal the suspension of their benefits are found to be eligible at the Referee hearing, *see* note 6, *supra*.

14. *See* Section II-A-1 of this Brief, *infra*.

> alone would be enough to warrant a finding that the procedure as we have above described it is not "reasonably calculated" to produce full payment "when due".

335 F. Supp. at 861.

The Division concedes that "unemployment compensation is basically a short-term program to aid persons off work only for the period of time it takes them to find work." Div. Br. at 14. *See also Java, supra,* 402 U.S. at 130-33. However, as shown above, the Division's own statistics reveal that the Indiana scheme does not result in paying benefits during the "limited period" between jobs as Congress intended, but rather results in payment several months after unemployment has ended. *See* H. R. REP. No. 615, 74th Cong., 1st Sess. [hereinafter "H. R. REP."] at 7 (1935); *Report To The President Of The Committee On Economic Security, Hearings on S. 1130 Before The Sen. Comm. On Finance,* 74th Cong., 1st Sess. at 1321-22 (1935).[15] Since the suspension of benefits pending an evidentiary hearing systematically denies "early substitute compensation during unemployment"[16] to eligible unemployed workers, it frustrates the fundamental objectives of the Social Security Act and, as the court below found, is not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1).

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15. As a California legislative study pointed out:

> It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter.

REPORT OF THE SENATE INTERIM COMMITTEE ON UNEMPLOYMENT INSURANCE TO THE FIFTY-SIXTH CALIFORNIA LEGISLATURE 62 (1945).

16. *See* California Department of Human Resources Development v. Java, 402 U.S. 121, 133 (1971).

2. The Division's Summary Suspension Procedure Frustrates the Congressional Purposes of the Unemployment Compensation Program.

a. *The summary suspension of benefits forces eligible recipients to rely on welfare for sustaining funds.* The chief purpose of the unemployment compensation program was to "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java, supra,* 402 U.S. at 131-32; *see generally,* H. R. REP. at 7; S. REP. No. 628, 74th Cong., 1st Sess. 12 (1935). Thoroughly familiar with the plight of workers "thrown out of work suddenly,"[17] Congress sought to alleviate the pressing need for "security during the period following unemployment." S. REP. No. 628, *supra.* However, because of the stigma attached to welfare, it was believed to be an inappropriate means of sustaining workers during temporary periods of unemployment. As was brought out on the House floor by the Chairman of the Ways and Means Committee:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief.

79 CONG. REC. 5468 (1935) (remarks of Representative Doughton).

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17. *See Hearings on H.R. 4120 Before the House Comm. on Ways and Means,* 74th Cong., 1st Sess. 214 (1935) (statement of Harry L. Hopkins).

Congress not only viewed welfare as imposing a stigma on unemployed workers, it doubted that welfare, with its reliance upon general tax revenues which fluctuate with the state of the economy, could adequately provide large numbers of workers with sustenance during a period of economic downturn. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937); Note, *Charity versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L. J. 357, 359 (1963). In order to reduce the burden on local welfare rolls during periods of economic crisis and "very materially reduce the cost of relief in future years,"[18] the Employment Security Fund was designed to accumulate reserves[19] in times of economic prosperity. *See* H. R. REP. at 7.[20]

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18. S.REP. No. 628, 74th Cong., 1st Sess. at 12. *See also* Java v. California Department of Human Resources Development, 317 F.Supp. 875, 879 (N.D. Cal. 1970), *aff'd.* 402 U.S. 121 (1971), in which the court stated: "The most fundamental purpose of both the Federal and the State unemployment compensation laws is 'to *prevent* the burden of injured employees becoming charges upon society.' " [citations omitted].

19. The Indiana Employment Security Fund contained a *surplus* of $310,220,000.00 on January 1, 1972. ANNUAL REPORT at 27.

20. Recent events have substantiated Congress' belief that state welfare systems cannot adequately deal with the economic dislocations caused by a severe period of unemployment. For example, in enacting emergency welfare legislation in 1971 to relieve the drain on welfare funds caused by unemployment, the California Legislature declared:

> The Legislature hereby finds that the high rate of unemployment, which has been aggravated in California's most populous regions by layoffs in the aerospace industries, has led to a high level of public assistance grants . . . . The Legislature further notes that increasing state taxes will have a depressing effect upon those individuals, firms, and industries now operating at a marginal level and will tend to further aggravate the unemployment rate and increase the welfare rolls . . . . The Legislature finds, therefore, that the most compelling state interest requires that the relationship between welfare and unemployment be recognized.

Welfare Reform Act of 1971, § 24.65, CAL. WELF. & INST. CODE § 11252.5 (West Supp. 1972).

In order for unemployment compensation to provide workers "security during the period following unemployment," *Java, supra,* 402 U.S. at 132, and thereby "to replace [relief] in large part," H. R. REP. at 7, benefit payments must continue throughout the period for which the unemployed worker has been found eligible. Interrupting the payment of benefits for several months pending an evidentiary hearing forces a large number of unemployed workers to turn to relief, or leaves them with no income whatsoever. Thus, by suspending a recipient's benefits before the evidentiary hearing on his continued eligibility, the Division undermines the Congressional purpose of "maintain[ing] the recipient at subsistence levels without the necessity of his turning to welfare or private charity," *Java, supra,* 402 U.S. at 131-32, thereby increasing the burden on the already overburdened state and local taxpayer.

b. *The summary suspension of benefits renders eligible workers less able to find substantially equivalent employment.* Unemployment compensation was established by Congress "as a means of assisting a worker to find substantially equivalent employment." *Java, supra,* 402 U.S. at 132. In explaining to the House Ways and Means Committee why the draftsmen of the Social Security Act chose to include an unemployment compensation program, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash.

Hearings on H.R. 4120 Before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 214 (1935) (statement by

Harry L. Hopkins, Federal Emergency Relief Administrator).

If manpower is able to flow from pockets of unemployment to areas where jobs are available, employment becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. But the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are terminated for several months during the period in which he is unemployed. The funds that might have been used to increase labor mobility may instead have to be spent on basic necessities. *Cf. Goldberg v. Kelly,* 397 U.S. 254, 264 (1970). Thus, to the extent that payments are delayed, the opportunity to find employment is diminished, which in turn often lengthens the period in which a recipient must rely on unemployment benefits for support. By suspending benefits pending an evidentiary hearing, only to pay them in a lump sum many months later, the Division is often responsible for a greater withdrawal from the Employment Security Fund than if payments were made in their regular course during the initial stages of unemployment.

c. *The summary suspension of benefits reduces the purchasing power of the unemployed.* Both the national economy and the unemployed worker benefit when purchasing power is maintained throughout periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." H.R. Rep. at 7; *see generally Java, supra,* 402 U.S. at 132-33. During the period in which they receive no compensation, unemployed workers are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms, which

in turn causes further unemployment, and eventually, economic depression. On the other hand, maintenance of purchasing power, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Social Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry.... The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity.

Hearings on S. 1130 Before the Sen. Comm. on Finance, 74th Cong., 1st Sess. 2 (1935).[21]

Thirty-five years later, in reporting the Federal-State Extended Unemployment Compensation Act of 1970 (Public Law 91-373), the Senate Committee on Finance reiterated the vital role of unemployment benefits in maintaining economic stability:

> In periods of economic recession, when substantial numbers of workers in a State or in the Nation experience unemployment which extends beyond the periods for which they are protected under current State Laws,

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21. Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security, which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance, come to a recognition that the small merchants of a locality, and those who provide them with their stock, have derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect upon employment in other lines than in that first depressed.

Hearings on S.1130 Before the Sen. Comm. on Finance, 74th Cong., 1st Sess. 111 (1935).

> the resulting uncompensated unemployment may have a serious impact not only upon the workers and their families, but on the purchasing power and economic health of the entire Nation.

S. Rep. No. 91-752, 91st Cong., 2nd Sess. (1970), *U.S. Code Cong. and Admin. News* at 3635.

For the maintenance of purchasing power to be achieved, it is necessary that unemployment benefits be paid throughout the critical period of unemployment, not in lump sum form, long after unemployment has ceased as is frequently the result under the Division's summary suspension procedure. Payments must *regularly* be made "early in the downturn, immediately after unemployment makes its appearance." *See* Clague, *The Economics of Unemployment Compensation,* 55 Yale L.J. 53, 69 (1945). Uninterrupted payments enable workers and their families:

> to preserve existing assets, such as homes, furniture, and automobiles, thus avoiding the forced liquidation of assets which aggravates the downturn in business. They encourage more confident spending of other resources, thus helping to avoid a "freezing" of purchasing power on the part of millions of workers when they are faced with unemployment.

Clague, *supra,* 55 Yale L.J. at 69.[22] Whereas lump sum payments may be spent erratically, a steady weekly income assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries such as agriculture, food, and clothing." *Id.* By interrupting the steady stream of benefit payments to unemployed workers for several months pending an evidentiary hearing, the Division's summary

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22. Unemployment compensation is "specially earmarked for the use of the unemployed at the very times when it is best for business that [it] should be so used." Statement of Senator Robert F. Wagner, *Hearings on S. 1130 Before the Sen. Comm. on Finance,* 74th Cong., 1st Sess., 2 (1935).

suspension procedure thus frustrates the Social Security Act's objectives of stabilizing the economy by maintaining the purchasing power of the unemployed. *Cf. Java, supra,* 402 U.S. at 132-33.

3. The Continued Claim Recipient Is Entitled To The Protection Of The "When Due" Clause.

Disregarding the fact that the summary suspension of benefits for several months directly contravenes the purposes of the Social Security Act, the Division attempts to justify the interruption of benefit payments by arguing that each week constitutes a "new" eligibility determination and that benefits are therefore only "due" for a one-week period. (Div. Br. at 7-9, 11-12). Both the Division's terminology and its practices belie this contention. After the initial eligibility investigation, *see Java, supra,* 402 U.S. at 125-28, the worker who has been found initially eligible is placed by the Division in a "continued claims" category. MANUAL §§ 13720-32. He has established his benefit rights as an "insured worker," IND. ANN. STAT. § 52-1526x (Burns 1964 Repl.); IND. ANN. STAT. § 52-1538d (Burns 1964 Repl. 1972 Supp.), and any disputes concerning the reasons for the termination of his last employment or the extent of his prior earnings have been resolved in his favor. *See Java, supra,* 402 U.S. at 125-29. He has been found eligible to receive a set amount of benefits for a fixed number of weeks. MANUAL § 13100. In short, following an initial determination of eligibility, the unemployed worker occupies a new position, entirely different from a worker whose entitlement to benefits has never been officially established.

Thereafter, although it is necessary for the recipient to "report to the local office to continue his claim," MANUAL § 13121, no new initial eligibility determination occurs. The recipient merely goes to the Division each week, executes a benefit voucher, and then is mailed his check. MANUAL

§ 13620.[23] Personal interviews occur not every week, but only at *five* or *ten* week intervals, depending on the recipient's category.[24] If his continued eligibility is challenged by the Division, it is unlikely that benefits will be withheld only for a particular week. Rather, depending upon the Division's

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23. Despite California's contention that unemployment recipients in Indiana and California undergo a *new* eligibility determination "each week" (California Amicus Brief [hereinafter "Cal. Br."] at 1-2, 7), their procedures show otherwise. In California, once a recipient has been found initially eligible for benefits, he need only report to the Department every two weeks to execute his computerized payment voucher and receive his check. *See* California Department of Human Resources Development, "Continued Claim Statement," DE 4581, Rev. 25 (Jan. 1972).

24. Section 13720 of the MANUAL provides that continued claim recipients be placed in one of three categories:

> *Group A*: Those claimants who have shown [in their initial eligibility investigation] a firm attachment to the labor market;
>
> *Group B*: Those claimants [who] . . . need further clarification or who . . . are classified temporarily until placed in the A or C groups;
>
> *Group C*: Those claimants who do not show a firm attachment to the labor market and who present problems of reemployment.

Unemployed workers placed in Group A are defined as:

> Those claimants [who] . . . have had employment with one employer or have been in a regular occupation for a long enough period of time to indicate that they want to obtain suitable work as soon as it can be found.

MANUAL § 13723. Group A workers are interviewed only once every *ten* weeks in a "special interview" whose purpose "is to determine whether or not the claimant shall continue in Group A." MANUAL § 13725.

Group C workers are defined as "Those claimants [for whom] . . . there are likely to be continuing questions of ability to work or availability . . . ." Even Group C workers (those who are deemed likely to present questions concerning the maintenance of their continued eligibility) ordinarily are informally interviewed only once every *five* weeks. MANUAL § 13727.

In addition to reporting for interviews every five or ten weeks, the recipient must come into the Employment Security office each week to fill out a voucher for his weekly check. In signing the voucher, he certifies whether he "work[ed] anywhere last week [and] if so, what were [his] earnings?" and whether he "refuse[d] an offer of work?" The MANUAL points out that in "accepting the voucher" it is unnecessary [for the clerk] to question the claimant in detail . . . with respect to each certification." MANUAL § 13620.

purported justification for the suspension, his benefits may be discontinued for what the Division terms a "penalty" period of several weeks, and often permanently. Div. Br. at 8.[25] In Mrs. Burney's case, for example, the erroneous termination of benefits was for an indefinite period.

As the court below properly found, therefore, benefits are not "due" each week, but rather are continuously "due" continued claim recipients throughout their fixed period of eligibility, unless they have been found on the basis of a full evidentiary hearing to have violated Division regulations:

> ... the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of eligibility .... The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under § 2-1542a(d). Having been found eligible pursuant to the [initial eligibility determination procedure], plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303(a)(1) of the Social Security Act. *See Java, supra*, 402 U.S. at 133-35.

J.S. at A-9—10.

To accomplish the objectives of the Social Security Act, Congress intended that continued claim recipients, no less

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25. *See* IND. ANN. STAT. § 52-1540 (Burns 1964 Repl.) (permanent termination for alleged misstatement); IND. ANN. STAT. § 52-1538b (Burns 1964 Repl., 1972 Supp.) (indefinite suspension for alleged continuing unavailability for work); IND. ANN. STAT. § 52-1539a (Burns 1964 Repl., 1972 Supp.) (suspension for alleged refusal of suitable work; (a) for benefit periods established before July 3, 1971—until claimant earns not less than ten times his weekly benefit amount, plus a 25% reduction in benefits; (b) for benefit periods established subsequent to July 3, 1971—for five consecutive calendar weeks or until claimant earns at least six times his weekly benefit amount, plus a 25% reduction in benefits).

than the initial recipients before the Court in *Java*, be afforded timely payment of unemployment compensation. Only an evidentiary hearing prior to the termination of benefits can achieve this goal, and insure eligible recipients "full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1).

B

BY DELAYING AN EVIDENTIARY HEARING UNTIL SEVERAL MONTHS AFTER THE SUSPENSION OF BENEFITS, THE DIVISION VIOLATES THE "FAIR HEARING" REQUIREMENT OF THE SOCIAL SECURITY ACT.

The Social Security Act requires that the Division afford a "fair hearing" to unemployment compensation recipients whose benefits it seeks to suspend. 42 U.S.C. § 503(a) (3). This statutory "fair hearing" must comport with due process requirements. As this Court stated in *Shields v. Utah-Idaho Central Ry. Co.*, 305 U.S. 177, 182 (1938), the "manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."[26]

It is uncontested that the "fair hearing" required by the Social Security Act must be a full evidentiary hearing.[27] It must also be a prior hearing. In interpreting other statutory "fair hearing" requirements, this Court has recognized

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26. *See also* Philadelphia Co. v. Securities and Exchange Commission, 175 F.2d 808, 817 (D.C.Cir. 1948), *vacated as moot* 337 U.S. 901 (1949).

27. Div.Br. at 16. In describing the elements that should be included in an unemployment compensation "fair hearing," the United States Department of Labor has specified the same procedural protections outlined by this Court in Goldberg v. Kelly, 397 U.S. 254 (1970):

> Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law: "timely notice to all claimants of every material step in the proceedings; . . . to hear the evidence

that in many instances a statute only satisfies due process if the hearing is provided *prior* to the deprivation of property. In *United States v. Illinois Central Railroad Company*, 291 U.S. 457 (1934), for example, an administrative procedure lacking a prior hearing was challenged on both statutory and constitutional grounds. The Court found that a prior hearing was required under the statute's fair hearing provision.[28] Having so ruled, the Court concluded that the statute satisfied due process requirements. Likewise, for the unemployment compensation statutory scheme to meet constitutional standards,[29] the "fair hearing" required by the Social Security Act must be a prior hearing.

Further, to assure fulfillment of the statutory purposes of the unemployment compensation program, only a hearing held before benefits are suspended meets the Act's "fair hearing" requirement. Only a prior hearing insures the regular flow of benefits to eligible workers—which "is what the unemployment insurance program was all about." *Java, supra*, 402 U.S. at 135. Anything less denies benefits during the critical period in which the Division recognizes unemployment compensation must be paid. (Div.Br. at 14).

The Division urges that the post-termination Referee hearing fulfills its "fair hearing" obligation under the Act. (Div.Br. at 16). However, by delaying this evidentiary hearing until several months after the suspension of a continued claim recipient's benefits, the Division fails to

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against him and to know the claims of his opponent; . . . to cross-examine witnesses; . . . that the Decision of the Board shall be governed by and based upon the evidence produced at the hearing . . . ."

U.S. DEPARTMENT OF LABOR UNEMPLOYMENT INSURANCE SERVICES OFFICE OF STATE OPERATIONS, GUIDE TO UNEMPLOYMENT INSURANCE BENEFITS APPEALS: PRINCIPLES AND PROCEDURES, 2-3 (1970). *See also* IND.ANN.STAT. §§ 52-1542b, 52-1558a (Burns 1964 Repl.); 4 IND. ADM. RULES & REGS. § (52-1542b)-1 Burns 1967).

28. *See also* Greene v. McElroy, 360 U.S. 474 (1959).

29. *See* Section II of this Brief, *infra*.

provide a "fair hearing" at a meaningful stage in the unemployment compensation cycle. Large numbers of eligible recipients are thereby deprived of "early substitute compensation during unemployment." *Java, supra,* 402 U.S. at 133. The Division's failure to provide a pre-termination evidentiary hearing directly contravenes the Congressional purposes of (1) providing sustenance and security to unemployed workers without relegating them to welfare, (2) helping workers in their search for new employment, and (3) maintaining the purchasing power of the unemployed through the continuous payment of benefits, and thus violates the Social Security Act's "fair hearing" requirement. 42 U.S.C. § 503(a)(3).

II

THE TERMINATION OF UNEMPLOYMENT BENEFITS WITHOUT ADEQUATE NOTICE AND A PRIOR EVIDENTIARY HEARING VIOLATES DUE PROCESS.

The framework for considering the requirements of procedural due process[30] was set forth by this Court in *Goldberg v. Kelly,* 397 U.S. 254, 262-63 (1970), a case that dealt with welfare terminations but otherwise is identical to the case *sub judice:*

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30. The identical constitutional issue presented in this case has been passed on by four lower courts. With the exception of one divided three-judge court, these courts have held that a prior evidentiary hearing is required before the termination of unemployment compensation benefits. *See* Wheeler v. Vermont, 335 F.Supp. 856 (D. Vt. 1971) (three-judge court); Crow v. California Department of Human Resources Development, 325 F.Supp. 1314 (N.D. Cal. 1970), *appeal docketed* 9th Cir. No. 71-1045; Java v. California Department of Human Resources Development, 317 F.Supp. 875 (N.D. Cal. 1970) (three-judge court), *aff'd on statutory grounds* 402 U.S. 121 (1971); *Contra* Torres v. New York State Department of Labor, 321 F.Supp. 432 (S.D.N.Y.) (divided three-judge court), *vacated* 402 U.S. 968, *judgment reinstated* 333 F. Supp. 341 (1971), *aff'd. per curiam* 405 U.S. 949 (1972), *petition for rehearing continued for further consideration* 40 U.S.L.W. 3001 (June 30, 1972).

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. [citations omitted].[31]

After weighing the interests of the recipients and the state, this Court held in *Goldberg* and its companion case, *Wheeler v. Montgomery*, 397 U.S. 280 (1970), that procedural due process requires an evidentiary hearing before welfare payments may be discontinued or suspended. This Court further ruled that the pre-termination hearing must contain the fundamental elements of "rudimentary due process," including timely and adequate notice detailing the reasons for a proposed termination, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and the right to a written decision by an impartial decision-maker based solely on the rules and evidence adduced at the hearing. *Goldberg v. Kelly, supra*, 397 U.S. at 267-71.

The principles enunciated in *Goldberg* are supported by a host of recent decisions of this Court, which firmly establish that a state must afford a prior hearing before depriving an individual of a significant property right or statutory entitlement. Interests found to demand such due process safeguards include wages, *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); reputation, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); marriage dissolution, *Boddie v. Connecticut*, 401 U.S. 371 (1971); driver's licenses,

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31. It is beyond dispute that procedural due process is applicable to the Division's actions in terminating unemployment benefits. As this Court held in Sherbert v. Verner, 374 U.S. 398 (1963) and specifically reaffirmed in Goldberg v. Kelly, 397 U.S. 254, 262 (1970): "Relevant constitutional restraints apply . . . to disqualification for unemployment compensation."

Bell v. Burson, 402 U.S. 535 (1971); custody rights, *Stanley v. Illinois*, 405 U.S. 645 (1972); consumer goods, *Fuentes v. Shevin*, 407 U.S. 67 (1972); and "de facto teacher tenure rights," *Perry v. Sinderman*, ... U.S. ....., 92 S.Ct. 2593 (1972).[32] As this Court recently reaffirmed in *Fuentes v. Shevin, supra*, 407 U.S. at ....., 92 S.Ct. at 1998, *Goldberg* did not "[mark] a radical departure from established principles of procedural due process," but rather was "in the mainstream of past cases . . . establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect."

The language of the *Goldberg* opinion indicates that notice and a prior evidentiary hearing are required before unemployment benefits may be terminated. In holding that welfare benefits may not be discontinued without such an evidentiary hearing, this Court made specific reference to a case dealing with unemployment compensation terminations—*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967)—for the proposition that a pre-termination evidentiary hearing is required when the loss of governmental benefits causes severe personal deprivation.[33] Thus, in distinguishing welfare terminations from the termination of such other governmental entitlements as contracts and tax exemptions, 397 U.S. at 264, the Court in *Goldberg* recog-

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32. *See also* Armstrong v. Manzo, 380 U.S. 545 (1965); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937); Southern Railway Co. v. Virginia, 290 U.S. 190 (1933); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Garfield v. Goldsby, 211 U.S. 249 (1908); Londoner v. City and County of Denver, 210 U.S. 373 (1908); Security Trust Company v. Lexington, 203 U.S. 323 (1906); Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876); *cf.* Connell v. Higginbotham, 403 U.S. 207 (1971).

33. The Court stated in Goldberg: "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care. *Cf.* Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967)." 397 U.S. at 264.

nized that similar deprivation is present in the case of unemployment compensation terminations.[34]

Such terminations present an even more compelling case for a prior evidentiary hearing than do welfare terminations. The factual issues in unemployment cases are more complex, necessitating a full evidentiary hearing in order to obtain accurate decisions; the governmental interest in summary adjudication is far less, since substantial recoupment of overpayments is available; like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is an earned "contractual right"[35] which workers rely upon being available should they become involuntarily unemployed.[36]

A

SINCE THE SUMMARY TERMINATION OF UNEMPLOYMENT COMPENSATION IMPOSES SEVERE ECONOMIC INJURY, INVOLVES COMPLEX FACTUAL ISSUES, AND SERVES NO OVERRIDING GOVERNMENTAL INTEREST, A PRIOR EVIDENTIARY HEARING IS CONSTITUTIONALLY REQUIRED.

1. The Termination of Unemployment Benefits Without a Prior Evidentiary Hearing Imposes Severe Hardship on Eligible Recipients.

At the very inception of the unemployment compensation program, this Court emphasized the singular importance of unemployment benefits in staving off the "evils of the

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34. As was recognized in Crow v. California Department of Human Resources Development, 325 F.Supp. 1314, 1318 (N.D. Cal. 1970), "it is *welfare*, not unemployment compensation . . . which was for the longest time deemed outside the protections of the due process clause. . . . It would be anomalous indeed if the Supreme Court's extension of procedural guarantees to welfare eligibility determinations was used to justify a restriction of similar rights previously recognized in other areas."

35. *See* California Department of Human Resources Development v. Java, 402 U.S. 121, 131 (1971); *see also* Div.Br. at 14.

36. In Board of Regents of State Colleges v. Roth, ... U.S. ....., ..., 92 S.Ct. 2701, 2709 (1972), the Court stated that a major purpose of procedural due process is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

attendant social and economic wastage" caused by unemployment. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 516 (1937). Thirty years later in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), a unanimous Court pointed out that the improper termination of unemployment benefits for a substantial period would cause an unemployed worker to "risk financial ruin." 389 U.S. at 239. In the words of Mr. Justice Black:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds.

Id. As recently as 1971, in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), this Court reiterated the "obvious" importance of unemployment compensation to the newly unemployed worker, since it provides cash "at a time when otherwise he would have nothing to spend." 402 U.S. at 131.[37]

The unemployment compensation system is part of the 1935 Social Security Act's comprehensive scheme of providing for the general welfare of all Americans during a period when they might otherwise be subject to severe economic deprivation. *See Helvering v. Davis*, 301 U.S. 619, 641-45 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937). Unemployment benefits serve to provide subsistence payments to unemployed workers and their families at a time when they have lost their source of income. Although providing greater dignity and security, they were intended to be complementary in nature and design to the Social

37. *See also* concurring opinion of Mr. Justice Douglas, California Department of Human Resources Development v. Java, *supra*, 402 U.S. at 136 (1971).

Security Act's welfare programs, providing the same sustenance for unemployed workers as welfare provides for the blind, disabled, young and aged. *See Java, supra; King v. Smith,* 392 U.S. 309, 327-33 (1968).

Thus, while the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." BECKER, THE INADEQUACY OF BENEFITS IN UNEMPLOYMENT INSURANCE, IN AID OF THE UNEMPLOYED [hereinafter "BECKER"], 80 (1965). A detailed case by case inquiry into individual necessities is not required, since need is based on class studies and "operates in terms of averages." BECKER, *supra.* Thus, a higher paid worker receives a small portion of his wages than does a lower paid worker; all eligible workers receive minimum benefits of uniform duration, regardless of the fact that their earnings may be disproportionately low; the amount of benefits a worker receives increases with the number of his dependents. *See* IND. ANN. STAT. §§ 52-1528b, 1536a(a), 1536c (Burns 1964 Repl. 1972 Supp.); BECKER, *supra* at 81. But while average rather than individual need is the criterion, the *raison d'etre* of the system is to meet individual needs:

> It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error.... If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established. BECKER, *supra* at 81.[38]

In holding that unemployment benefits may not be terminated or suspended without a prior evidentiary hearing, a three-judge district court in Vermont pointed out:

> The fact that unemployment benefits are paid without reference to need, that is to say, without reference to a

38. *See* California Department of Human Resources Development v. Java, *supra,* 402 U.S. at 130.

> means test, does not mean that a given claimant's need is qualitatively different from that of a welfare recipient. While such need may from time to time not be, in *Goldberg's* turn of phrase, "brutal," speaking quantitatively, it is nonetheless compelling in the constitutional sense; the payment of unemployment benefits to those entitled to them permits retention of the basic human dignity that past accomplishment alone merits, avoiding in Macauley's stark phrase, sinking, after many vicissitudes of fortune, into "abject and hopeless poverty." [citation omitted].

Wheeler v. Vermont, 335 F.Supp. 856, 861-62 (D.Vt. 1971).[39]

Empirical data confirms the vital role of unemployment benefits. For the average recipient, unemployment imposes severe financial hardship even with the uninterrupted payment of benefits. The median liquid assets available to a typical worker's family[40] to meet an emergency is only $260.00. KATOMA, SURVEY OF CONSUMER FINANCES, Table 6-3 at 100 (1970). But unemployment is especially likely to fall upon workers without any liquid assets.[41] Fifty-three percent of all unemployed workers in Indiana who are found eligible

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39. As Judge Lasker pointed out in his dissent in Torres v. New York State Department of Labor, *supra,* 321 F.Supp. at 439: "the 'brutal need' standard referred to in Goldberg relates to actual financial want and not eligibility requirements."

40. There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 40 at 35 (1970).

41. Even when employed, the average unemployment compensation recipient is hardly able to keep above the poverty line. In California, for example, the median annual earnings of unemployment compensation recipients was $3,933. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, CLAIMANTS WHO FILED VALID NEW CLAIMS OCTOBER 1966-SEPTEMBER 1967, REPORT No. 416, No. 6 at 3 (April 1, 1970); in New York, more than 40% of unemployment compensation recipients earned less than $3,000 and more than 70% earned less than $5,000 in 1967. NEW YORK STATE DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE BENEFICIARIES (March 1970).

for unemployment benefits file more than one claim per benefit year. INDIANA EMPLOYMENT SECURITY DIVISION, SOME SIGNIFICANT STATISTICS ABOUT UNEMPLOYMENT INSURANCE IN INDIANA [hereinafter "SIGNIFICANT STATISTICS"] Table 8 at 7 (March 1972). Employees who experience more than one unemployment episode per year are usually unable to build up cash reserves for periods of sudden unemployment. Since an unemployed worker must wait at least three weeks before unemployment benefits initially commence, *see* MANUAL § 13130; *Java, supra,* 402 U.S. at 126, all of his savings will ordinarily have been exhausted by the time payments begin.

Once payment of benefits does begin, the amount of money a recipient receives constitutes only a fraction of his former salary.[42] In order to adjust to the acute curtailment of family income, basic necessities often have to be sacrificed. According to one survey, twenty-six percent of households receiving unemployment benefits must resort to reductions in food expenditures, usually in the first week of unemployment. *See* P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 35, 40 (1965). Many recipients are forced to default on fixed obligations.[43] In over one-quarter of the households receiving unemployment compensation, the family is forced to go into debt during the year of unemployment. *See* P. KLEIN, *supra* at 3. It is expected that this percentage is even higher among the recipients presently before this

42. In 1971, unemployment benefits in Indiana constituted less than 28% of the average wages of workers covered by the unemployment compensation program. SIGNIFICANT STATISTICS, *supra,* Table 6 at 6.

43. *See* Note, *The Relationship of Unemployment to Mortgage Foreclosure,* 86 MONTHLY LAB. REV. 1421, 1422 (1963). Approximately 30% of all unemployment compensation claimants become delinquent in payments on new appliances, and 14% become delinquent in rent payments. *See* P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 31 (1965).

Court who, although found eligible for benefits for a fixed duration, receive no funds for many months pending an evidentiary hearing. For these unemployed workers, the loss of unemployment benefits may be devastating. A study based on over five million unemployment compensation recipients points out that "the combination of all other types of non-wage income contributed less to the aggregate income of the unemployed than did unemployment insurance." Stein, *Special Labor Force Report: Work History, Attitudes & Income of the Unemployed*, 86 MONTHLY LAB. REV. 1405, 1411 (1963).

For the unemployment compensation recipient whose benefits are summarily terminated, welfare or charity is either unavailable or poses a cruel[44] and inadequate substitute for unemployment benefits. There are four categorical public assistance programs created by the Social Security Act and administered by the states: Blind Assistance, IND. ANN. STAT. §§ 52-1221—52-1239b (Burns 1964 Repl., 1972 Supp.); Disability Assistance, IND. ANN. STAT. §§ 52-1251a—52-1251v (Burns 1964 Repl., 1972 Supp.); Old Age Assistance, IND. ANN. STAT. §§ 52-1201—52-1220 (Burns 1964 Repl., 1972 Supp.); and Aid to Families with Dependent Children, IND. ANN. STAT. §§ 52-1240—52-1251 (Burns 1964 Repl., 1972 Supp.). Since an unemployment compensation recipient would have to be blind, disabled, or of retirement age to qualify for the first three categories, these

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44. As Congress recognized in instituting a national unemployment compensation program, the unemployed worker, having worked and provided for his own needs, may feel that his dignity, privacy, reputation, and self-respect have been compromised if he is forced onto the welfare rolls. *See* P. DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 20 (1933); Handler & Hollingsworth, *Stigma, Privacy and Other Attitudes of Welfare Recipients*, 22 STAN.L. REV. 1 (1969). Moreover, one of the chief purposes of the unemployment compensation program is to provide income for an unemployed worker "without the necessity of his turning to welfare or private charity." Java, *supra*, 402 U.S. at 131.

would generally not be available to him, as he, by definition, must be eligible for the labor market. IND. ANN. STAT. §§ 52-1538a—52-1538b (Burns 1964 Repl., 1972 Supp.). In order to qualify for the fourth category (AFDC), the worker would have to be the only able bodied parent in a household with children under eighteen years of age, a requirement which excludes all workers without children, and the overwhelming proportion of workers with spouses.[45] Furthermore, to receive AFDC assistance a family must have less than $700 in assets. INDIANA PUBLIC ASSISTANCE MANUAL, Chapter IV-B-10.

Nor are local emergency relief programs a feasible alternative. If an unemployment compensation recipient's benefits are terminated for either refusing an offer of "suitable" work or being "unavailable" for work—as is the case in most unemployment compensation terminations—it will be virtually impossible for him to qualify for emergency relief.[46] Moreover, in the unlikely event that he does qualify, emergency relief cannot be counted on to provide even a bare subsistence level of benefits. Unlike many states, Indiana does not even have a county-operated general assistance

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45. Unlike some states, Indiana does not provide AFDC assistance for children of an unemployed father. The AFDC program for dependent children of unemployed fathers (AFDC-U) was established by § 407 of the Social Security Act (42 U.S.C. § 607), with participation by the states made optional. Indiana has chosen not to participate in the program. Even in those states participating in the AFDC-U program, a claimant who is denied unemployment compensation for allegedly refusing a suitable work offer will automatically be denied AFDC-U. 42 U.S.C. § 607(b)(1)(B).

46. As a condition of establishing eligibility for local emergency relief, IND. ANN. STAT. § 52-152(a) (Burns 1964 Repl., 1972 Supp.) provides:

> If the poor persons applying are in good health, or if any members of their families are so, the overseer shall insist that those able to labor shall seek employment, and he shall refuse to furnish any aid until he is satisfied that the persons claiming help are endeavoring to find work for themselves.

program. Emergency relief is a wholly local program funded by local resources and administered by township trustees without any state standards.[47] *See generally* IND. ANN. STAT. §§ 52-139—52-199 (Burns 1964 Repl., 1972 Supp.). Over 1000 township programs exist in the state[48] varying widely in coverage and amount of benefits provided.

Thus, an unemployed wage earner whose unemployment benefits have been summarily terminated is either entirely excluded from all forms of relief[49] or would suffer financial ruin in the unlikely event that he is found qualified for local emergency relief. And, even if eligible for welfare, he would first be required to undergo a humiliating eligibility investigation[50] by the local welfare agency which may not be completed for a number of weeks.[51] Thus, not only does he and his family suffer great embarrassment if forced onto welfare, he is also precluded from receiving any income whatsoever during the critical short term period when Congress intended unemployment compensation to be paid.[52]

The wrongful termination of unemployment benefits for many months may, therefore, cause economic catastrophe. As the court below found in its ruling of May 7, 1971 grant-

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47. See Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. L.REV. 787, 813 (1968).

48. For a listing of the townships, *see* IND. ANN. STAT. §§ 65-211, 65-220 (Burns 1961 Repl.).

49. *See* Judge Lasker's dissenting opinion in Torres v. New York State Department of Labor, *supra*, 321 F.Supp. at 439.

50. *See e.g.*, IND. ANN. STAT. § 52-149 (Burns 1964 Repl.) (investigation by "overseer of the poor"); IND. ANN. STAT. § 52-153 (Burns 1964 Repl.) (duty of "overseer of the poor" to contact recipient's relatives).

51. *See e.g.* INDIANA PUBLIC ASSISTANCE MANUAL, Chapter VII-A-1 which provides that the determination of AFDC eligibility need not be completed for 30 days.

52. *See* p. 16, *supra;* Div. Br. at 14.

ing Mrs. Burney a temporary restraining order: "the continued withholding and termination of unemployment compensation benefits will deprive [her] of the source of income necessary to meet her food, clothing and shelter needs."

Defendants rely on *Torres v. New York State Department of Labor,* 321 F.Supp. 432 (S.D.N.Y.) (three-judge court), *vacated* 402 U.S. 968, *judgment reinstated* 333 F.Supp. 331 (1971), *aff'd* 405 U.S. 949 (1972), *petition for rehearing continued for further consideration* 40 U.S.L.W. 3001 (June 30, 1972), for the proposition that *Goldberg* does not apply to unemployment terminations. Without citation of authority, and on the basis of a "sparce and superficial" record, 321 F.Supp. at 439 (dissenting opinion), the majority in *Torres* assumed that "brutal need" was not present in the unemployment compensation context and that retroactive benefits, payable many months after termination, met the needs of unemployment recipients. Apart from the *Torres* majority, every other court considering the issue has explicitly rejected the *Torres* rationale,[53] including a three-

53. *See* note 30, *supra.*

After a long and tortured history, the Torres case is again pending before this Court. The factual situation of the subclass represented by plaintiff Torres is unusual, anomalous, and clearly distinguishable from the present case. *See* Div. Br. at 7n.3. Unlike the situation of both Mrs. Burney and her class and the welfare recipients in Goldberg v. Kelly, *supra,* plaintiff Torres' case involves a question of *initial* rather than continuing eligibility.

Plaintiff Torres was ineligible for benefits from the outset and received them only through a fluke. The Department had incorrectly addressed the questionnaire it sent to Torres' last employer asking the reasons for Torres' termination from employment. The employer did not receive the form and consequently did not have an opportunity to provide information concerning Torres' initial eligibility. *Compare* California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). Upon finally receiving a remailed questionnaire, the employer supplied the relevant information. On the basis of the information supplied by the employer, the Department "reconsidered" Torres' case and found that he had

judge district court in the same circuit.[54] Both empirical data and congressional findings demonstrate that unemployment compensation benefits are "vitally needed." And this Court has specifically stated that lump sum payments many months later are unlikely to make the recipient whole. *Nash v. Florida Industrial Commission, supra,* 389 U.S. at 239.

As in *Goldberg,* then, the "crucial factor" of need pervades this case.[55] Having been found initially eligible for unemployment compensation, the recipient has by definition involuntarily lost his last job. Weeks may pass before he

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never met initial eligibility requirements. Torres v. New York State Department of Labor, *supra,* 321 F.Supp. at 435.

The Torres case also involves a second, separate subclass represented by plaintiff Dinger. The issue raised in Dinger's case is similar to the issue presented herein by Mrs. Burney: whether unemployed workers who have fully met initial eligibility requirements may subsequently be terminated without a prior evidentiary hearing for reasons unrelated to their initial eligibility. The decision on this issue need have no bearing on the disposition of the issue presented by the subclass represented by plaintiff Torres.

54. *See* Wheeler v. Vermont, 335 F.Supp. 856, 861 (D. Vt. 1971). As the court stated therein:

> . . . we agree with Mr. Justice Douglas, concurring in Java, 402 U.S. at 135, Judge Lasker dissenting in Torres, 321 F. Supp. at 438, the California district court in Crow, *supra,* and the district court in Java that unemployment compensation benefits cannot be treated differently from the welfare benefits in Goldberg v. Kelly. . . .

Cf. Fuentes v. Shevin, 407 U.S. 67, ..., 92 S.Ct. 1983, 1998-99 (1972).

55. The unemployment compensation recipient whose benefits are summarily terminated is in far more desperate straits than the wage earner whose paycheck was garnished in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Under the Wisconsin prejudgment garnishment statute declared unconstitutional in Sniadach, a worker continued to receive a statutory "subsistence allowance" of $25.00 to $40.00 per pay period. 395 U.S. at 338 n.1. For the unemployment compensation recipient, the entire "subsistence allowance" is terminated, and nothing whatever is paid pending the hearing in his case. Even more than prejudgment garnishment, therefore, the summary termination of unemployment benefits "may as a practical matter drive a wage-earning family to the wall." Sniadach, *supra,* 395 U.S. at 341-42.

is able to find new work, especially in a period of widespread unemployment.[56] Here, as in *Goldberg*:

> The termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.

Goldberg v. Kelly, supra, 397 U.S. at 264.

2. Since the Termination of Unemployment Compensation Involves Complex Factual Issues, a Prior Evidentiary Hearing Is Especially Necessary to Prevent the Wrongful Denial of Benefits.

"The essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property." *Fuentes v. Shevin,* 407 U.S. 67, ..., 92 S.Ct. 1983, 2002 (1972). The striking unfairness of the Division's present summary termination procedure is revealed by the fact that it repeatedly and systematically results in the erroneous termination of benefit payments to *eligible* recipients. For example, during the first three months of 1972, 49.2 per cent of all appealed Division decisions to terminate benefits were reversed at Referee hearings. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18 at 10 (May, 1972). This figure far exceeds the reversal rate of 36 per cent for welfare terminations, which the district court in *Goldberg* described as a "startling statistic."[57] The consistent unreliability[58] of the informal

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56. The Indiana seasonally adjusted unemployment rate averaged 5.6% in 1971. *See* ANNUAL REPORT, *supra,* at 19.

57. *See* Kelly v. Wyman, 294 F.Supp. 893, 901 (S.D.N.Y., 1968) (three-judge court); *see also* Crow v. California Department of Human Resources Development, 325 F.Supp. 1314, 1318 (N.D. Cal. 1970). As the U.S. Court of Appeals for the Fifth Circuit stated in another context: "We do not abdicate our judicial role to statistics. But when figures speak, we must listen." Hall v. St. Helena Parish School Board, 417 F.2d 801, 809 (5th Cir. 1969).

58. The current reversal rate of 49.2% is not atypical. In the calendar year 1971, 45.9% of all appealed decisions terminating

interview process used by the Division underscores the fact that the procedures traditionally required by due process are not mere "niceties" (J.S. at 10) or "labels" (Cal. Br. at 13), but rather are essential to protect unemployed workers against arbitrary governmental action.[59] Indeed, in cases of appealed unemployment compensation terminations, the Division would have achieved a similar degree of accuracy merely by flipping a coin.

A prior evidentiary hearing is particularly necessary to achieve accurate decisions in unemployment termination cases. Such hearings are essential "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). The issues most frequently arising in unemployment cases are, in the words of the court in *Crow v. California Department of Human Resources Development*, 325 F.Supp. 1314, 1316 (N.D. Cal. 1970), "preeminently factual." Such cases often present many of the following questions: Was the recipient available for work? Did he make an adequate effort to secure work? Did he adequately investigate job prospects at a union hiring hall? Did he display the proper attitude and behavior at job interviews? Did he place improper restrictions on the types of jobs he would consider? Has he taken any action that would preclude an offer of employment? Did he comply with Division reporting requirements? Did he

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eligibility were reversed by Referees. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18a at 14 (March 1972). In 1970, the reversal rate was 40.3%, and in 1969 it was 42.1%. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18 at 13 (March 1970).

59. In Fuentes v. Shevin, 407 U.S. 67, ..., 92 S.Ct. 1983, 2002 (1972) the Court recognized as "axiomatic that the hearing must provide a real test."

make a willful misstatement in order to obtain benefits? Did he hold a job while drawing benefits? Was he physically able to work? Did he receive and refuse an offer for work? If so, was the work "suitable"? Did he receive sufficient information relative to the duties, hours of work and working conditions to enable him to make a determination as to the suitability of the work? Did a prospective job involve a risk to his health, safety or morals? Was he physically fit to perform this particular job? Did the prospective job comport with his prior training and experience? What is the nature of the job market in his customary occupation? Has the period of his unemployment been so long as to require him to accept a less skilled and lower-paying job? Is a prospective job located within a reasonable commuting distance from his home? See IND. ANN. STAT. §§ 52-1538a, 52-1538b, 52-1539a (Burns 1964 Repl., 1972 Supp.); § 52-1540 (Burns 1964 Repl.). *See also* 4 C.C.H. UNEMPL. INS. RPTR., Ind. §§ 1001, *et seq.* The answer to each of the above questions frequently involves a subjective judgment of the character and honesty of recipients and the application of complicated legal standards to a variety of disputed facts. It also involves the evaluation and interpretation of third party information provided by sources other than the recipient and the Division interviewer.[60]

As the Division concedes, third party information is frequently dispositive.[61] *See Crow v. California Department of Human Resources Development*, 325 F.Supp. 1314, 1318-20 (N.D.Cal. 1970). For example, a prospective employer is often the source of information regarding such issues as

60. *See, e.g.*, Gardner v. Review Board of Indiana Employment Security Division, 267 N.E.2d 844 (Ind.App.Ct. 1971); Walton v. Wilhelm, 120 Ind.App. 218, 91 N.E.2d 373 (1950).

61. "Information might come from the report on a job referral from the Division or from any other source." Div. Br. at 18.

whether a job offer was actually made,[62] a recipient's attitude, enthusiasm and behavior during a job interview, the conditions of the job, and whether a job offer was refused.[63] Outside informers of questionable veracity may, as in many of the welfare terminations in *Goldberg v. Kelly*, 397 U.S. 254 (1970),[64] supply "tips" used to disqualify recipients. This particularly occurs in cases involving a recipient's alleged failure diligently to look for work or his secretly working. Division personnel other than the interviewing clerk may provide information regarding the violation of instructions they have purportedly given to the recipient. Other cases turn on objective facts provable only by third parties, as when issues are raised concerning the condition of the local job market or the availability of child care facilities.

In Mrs. Burney's case, for example, the question of whether she "refused an offer of suitable work" under IND. ANN. STAT. § 52-1539a (Burns 1964 Repl., 1972 Supp.) or was "unavailable for work" under IND. ANN. STAT. § 52-1538b (Burns 1964 Repl., 1972 Supp.) required a determination of the availability of child care and public transportation after midnight, the safety of public transportation at that hour, Mrs. Burney's physical condition, the prospects of her obtaining work at other hours and her independent efforts to do so, and whether the job she was

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62. *See* Wheeler v. Vermont, 335 F.Supp. 856, 858-59 (D.Vt. 1971); Crow v. California Department of Human Resources Development, 325 F.Supp. 1314, 1319 n.3 (N.D.Cal. 1970).

63. In cases of offers of re-employment by "base-period" employers, these sources will have a direct economic stake in disqualifying the recipient, since the taxes they are required to pay into the Employment Security Fund vary in proportion to the amount of benefits paid to their ex-employees. IND.ANN.STAT. § 52-1535 (Burns 1964 Repl., 1972 Supp.). *Cf.* Sniadach v. Family Finance Corp., 395 U.S. 337, 338-39 (1969).

64. In Kelly v. Wyman, 294 F.Supp. 893, 905 (S.D.N.Y. 1968) (three-judge court), Judge Feinberg describes how plaintiff Velez was "cut off on the basis of untrue rumors and reports."

offered matched her qualifications. *See Hacker v. Review Board of Indiana Employment Security Division,* 271 N.E.2d 191 (Ind. App. Ct. 1971)[65]; *Renwanz v. Review Board of Indiana Employment Security Division,* 267 N.E.2d 844 (Ind. App. Ct. 1971).

Unemployment compensation termination cases are thus classic examples of instances where governmental action is challenged "as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg v. Kelly, supra,* 397 U.S. at 268. Even more than in the welfare terminations at issue in *Goldberg,* the complexity of the issues and the nature of the evidence make an evidentiary hearing necessary to prevent the wrongful termination of unemployment benefits. Yet under the Division's termination procedure challenged in this case, the decision whether an unemployed worker will continue to receive unemployment benefits—a decision which may be of monumental importance to him and his family—is made at an informal "interview" by an often harried clerk who each week must process hundreds of recipients.

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65. The Division and amicus employers falsely suggest that the decision to terminate Mrs. Burney was made without knowledge of the Hacker opinion. (Div.Br. at 18, n. 2; Employers' Amicus Brief [hereinafter "Employer Br."] at 4-5). To the contrary, the record shows that the Referee considered and indeed distinguished Hacker in deciding Mrs. Burney's case. *See* Referee Decision, appended to Defendant's Response to Request for Admissions. Moreover in reversing the Referee, the Review Board did not even cite, let alone rely upon, the Hacker decision. In the matter of Burney, Ind. Employment Security Div. Review Bd., Case No. 71-R-297 (Dec. 6, 1971).

In any event, Hacker marked no new departure in the applicable law. Citing Nelson v. Review Board of Employment Security Division, 119 Ind.App. 10, 16, 82 N.E.2d 523, 526 (1949), the Hacker court merely reaffirmed that "the determination of whether a given individual is available for work is a question of fact to be determined in light of the circumstances of each particular case." *See* Hacker v. Review Board of Indiana Employment Security Division, 271 N.E.2d 191, 196-97 (Ind. App. Ct. 1971).

The Division's informal termination interview does not contain the "rudimentary due process" elements of an evidentiary hearing specified in *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). Rather than receiving "timely and adequate notice detailing the reasons for a proposed termination," *Goldberg, supra*, 397 U.S. at 267-68, a recipient usually first learns of the Department's proposed actions and the reasons therefor at the beginning of his periodic interview. Not having been forewarned of the issues involved, he has been unable to gather evidence or locate and present witnesses. He has likewise had virtually no time to familiarize himself with his substantive rights as a recipient or to secure representation.[66] This lack of adequate prior notice completely nullifies a recipient's supposed rights to prepare a defense, secure counsel, and personally present his case "at a meaningful stage in the proceedings." *See* Cal.Br. at 10. As this Court stated years ago:

> It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose .... [A] man should not be required . . . instantly to answer a charge ... on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of [notice] and hearing.

Roller v. Holly, 176 U.S. 398, 409-10 (1900).[67]

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66. Recipients may be represented in unemployment termination proceedings either by lay representatives or by counsel. IND. ANN. STAT. § 52-1558a (Burns 1964 Repl.). Representation is frequently provided by labor unions and legal assistance programs.

67. *See also* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950); Morgan v. United States, 304 U.S. 1, 25 (1938).

Goldberg further recognized that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." *Goldberg, supra,* 397 U.S. at 269-70. But at the Division's termination interview, a recipient is allowed no opportunity to confront and cross-examine the many outside sources whose information may be the basis for his disqualification. Without the historic rights of confrontation and cross-examination, a recipient has no viable means of rebutting the case against him. He is at the mercy of "individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Greene v. McElroy,* 360 U.S. 474, 497 (1959). As this Court pointed out in *Greene, supra:*

> . . . [T]he requirements of confrontation and cross-examination . . . have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion . . . in all types of cases where administrative . . . actions were under scrutiny.

360 U.S. at 497-98. [citations omitted].

Goldberg also specified that a terminated recipient is entitled to "an impartial decision-maker" and a decision "rest[ing] solely on the legal rules and evidence adduced at the hearing." *Goldberg, supra,* 397 U.S. at 271. However, the interviewing clerk responsible for terminating benefits may have had a previous long and hostile involvement with the recipient, *see* Harris, *Claimant Views of Unemployment Insurance Administration in California,* 4 UNEMP. INS. REV. 2 (1967), or may have given the very Division instructions whose issuance or reasonableness is in question. He also is under no stricture to rest his decision solely on the legal

rules and evidence adduced at the interview; thus he may base the ruling on his own background and knowledge or on information obtained outside the interview.

Lacking the procedural safeguards specified in *Goldberg*, the accuracy of the Division's pre-termination interview[68] depends solely on an interviewing clerk's inclination, ability and time to seek out and judge relevant information, and on the ability of recipients who are frequently of limited education to marshal and articulate their cases on the spur of the moment to an accusing Division official.[69] The likelihood of error inherent in these circumstances is confirmed by the fact that in almost one-half of the appealed cases, the Division is found to have arrived at erroneous decisions.[70]

The Division contends that because the Referee hearing held several months "after the fact"[71] contains the elements specified in *Goldberg*, its procedures satisfy due process.

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68. In Goldberg's companion case, Wheeler v. Montgomery, 397 U.S. 280 (1970), the Court struck down a pre-termination informal interview procedure similar to that utilized by the Division. Unlike the Division's procedure, in which no effective notice is provided, the welfare interviews in Wheeler at least were preceded by three days' advance notice.

69. In discussing the unemployment clerk's counterpart in the welfare system, the Court in Goldberg specifically recognized the great "possibility of honest error or irritable misjudgment" in his decisions. Goldberg v. Kelly, 397 U.S. 254, 266 (1970), *quoting* Kelly v. Wyman, 294 F.Supp. 893, 904-05 (S.D.N.Y. 1968) (three-judge court).

70. See nn. 6 and 58, *supra*.

71. After summarily terminating recipients, the Division does not even afford them a prompt post-termination evidentiary hearing. In 1971, only 0.5% of all Referee hearings were decided within 30 days; only 4.5% were decided within 45 days; and only 27.7% were decided within 75 days. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 17a at 12 (March, 1972).

Div.Br. at 16, 18. *See also* EmployerBr. at 18.[72] In *Goldberg's* companion case, *Wheeler v. Montgomery*, 397 U.S. 280 (1970), *rev'g.* 296 F.Supp. 138, 140 (N.D.Cal. 1968), this Court rejected an identical argument. *See also Stanley v. Illinois*, 405 U.S. 645, ..., 92 S.Ct. 1208, 1210 (1972). As was recently reaffirmed in *Fuentes v. Shevin*, 407 U.S. 67, ..., 92 S.Ct. 1983, 1994-95 (1972):

> If the right to notice and a hearing is to serve its full purpose, then, it is clear it must be granted at a time when the deprivation can still be prevented .... No later hearing and no damage award can undo the fact that the arbitrary taking . . . has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." [citation omitted].

For most unemployed workers, the severe personal deprivation caused by the wrongful termination of benefits can never be cured by the repayment of benefits many months later.[73]

3. No Overriding Governmental Interest Justifies Terminating the Payment of Benefits Without a Prior Evidentiary Hearing.

Because of the potential for harsh, erroneous, and arbitrary results, this Court has narrowly restricted the use

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72. The Division characterizes the "rudimentary" procedures specified in Goldberg and ordered by the court below as being "somewhat more formal and exacting than a court trial." Div.Br. at 18. The Division's post-termination practices belie this contention. In the Division's post-termination Referee hearing, the elements specified in Goldberg are all provided. Indiana statutes specifically allow such hearings to be held without "common law or statutory rules of evidence and other technical rules of procedure." IND.ANN.STAT. § 52-1542e (Burns, 1964 Repl.). In their amicus brief, Indiana's employers more realistically acknowledge that the post-termination Referee hearing is "designed to assure informality and fairness." EmployerBr. at 13.

73. *See* Section II-A-1 of this Brief, *supra.*

of summary procedures to a limited category of cases. Circumstances justifying summary procedures under the due process clause have been described as "emergency situations," *Bell v. Burson*, 402 U.S. 535, 542 (1971), "extraordinary," *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) and "truly unusual," *Fuentes v. Shevin;* 407 U.S. 67, ..., 92 S.Ct. 1983, 1999 (1972).[74] A review of the cases in which "emergency situations" justifying summary procedures were found to exist reveals that they bear no resemblance to the Division's alleged interests in this case: *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human consumption); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabled vitamin product); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (conservatorship of insolvent saving and loan association); *Yakus v. United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (access to military installation).[75]

The primary governmental interest advanced to justify summarily terminating unemployment benefits is the desire to minimize administrative inconvenience and expense. Div. Br. at 19, EmployerBr. at 11, Cal. Br. at 2. In *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970), similar considerations were also urged to justify terminating welfare benefits prior to an evidentiary hearing. Despite the fact that substantial expenditures were involved, 397 U.S. at 266, this Court held that the factors of expense and administrative convenience did not justify denying a pre-termination evidentiary hearing. 397 U.S. at 261. As this Court stated:

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74. In his concurring opinion in Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969), Mr. Justice Harlan used the phrase "essential to protect a vital governmental interest."

75. *See* additional cases collected in Fuentes v. Shevin, 407 U.S. 67, ..., 92 S.Ct. 1983, 1999-2000 (1972).

> The interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

397 U.S. at 266.[76]

While *Goldberg* holds that the desire to minimize the expenditure of government funds does not, in any event, justify summarily terminating the payment of benefits, it should be noted that the amount of expenditures necessitated by pre-termination evidentiary hearings in the unemployment compensation program are minimal in comparison to the amount of expenditures necessitated by such hearings in welfare. In welfare, any benefits wrongfully paid to recipients pending an evidentiary hearing are likely to be unrecoverable, since welfare recipients "are likely to be judgment-proof." *Goldberg, supra,* 397 U.S. at 266. Unemployment compensation recipients, on the other hand, are by definition employable, IND. ANN. STAT. § 52-1538b (Burns 1964 Repl., 1972 Supp.), and thus are likely to return to work in the future and accumulate sufficient funds to satisfy any amounts owed the Division because of an overpayment.

The Division has ample means of recouping any overpayments that may occur. If an overpayment is not voluntarily

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76. Just last term, in Stanley v. Illinois, 405 U.S. 645, ..., 92 U.S. 1208, 1215 (1972), the Court reaffirmed this principle. As Mr. Justice White stated:

> The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy governmental officials no less and perhaps more than mediocre ones.

repaid, the Division can both offset the amount owed against any future benefits to which the recipient may become entitled, IND. ANN. STAT. § 52-1537(b) (Burns 1964 Repl., 1972 Supp.),[77] and institute civil proceedings to recover the overpayment, IND. ANN. STAT. § 52-1537(e) (Burns 1964 Repl., 1972 Supp.). Criminal sanctions may also be imposed and restitution ordered if a recipient makes a false statement or fails to disclose material facts. IND. ANN. STAT. § 52-1559 (Burns 1964 Repl., 1972 Supp.). The striking ability of the Division to recover overpayments is proved by its own statistics, which show that in 1971, approximately 72% of all overpayments made to ineligible recipients were recouped. ANNUAL REPORT, *supra* at 34.

The Division also has available alternative means of reducing overpayments that do not entail terminating the "sustaining funds"[78] of eligible recipients. As this Court pointed out in *Goldberg, supra,* 397 U.S. at 266:

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

See also Wheeler v. Vermont, 335 F.Supp. 856, 862 (D.Vt. 1971) (three-judge court). By increasing the number of Referees, the Division could markedly reduce the unreasonably long period between the filing of an appeal and the

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77. Offsetting overpayments against future benefits is a highly effective device, since approximately 53% of all eligible claimants file more than one claim in the same benefit year. *See* SIGNIFICANT STATISTICS, *supra* at 7. Moreover, since the maximum period of unemployment compensation eligibility is generally 26 weeks, recoupment from recipients whose benefits are suspended for 5 or 10 week periods can sometimes be accomplished during the same period of unemployment.

78. Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967).

issuance of a Referee's decision.[79] Since the Division's administrative costs are reimbursed by the federal government[80] and may not be drawn from the Employment Security Fund, 42 U.S.C. §§ 503(a), 1103(c) (1), the hiring of additional Referees would have no effect on the amount of money available for the payments of benefits.

In contending that prior evidentiary hearings run counter to their interest in minimizing administrative inconvenience, the Division ignores the many important governmental interests that are advanced by the payment of benefits pending an evidentiary hearing. *See* pp. 17-23 of this Brief, *supra; see also California Department of Human Resources Development v. Java,* 402 U.S. 121, 130-33 (1972). Indeed the Division has conceded that, to accomplish the purposes of its unemployment compensation program, benefits must be paid to eligible recipients during the "short term" period in which they are involuntarily unemployed. Div.Br. at 14. This Court's statement in *Goldberg, supra,* 397 U.S. at 265 in a welfare context applies equally well to the wrongful termination of unemployment compensation:

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

The summary termination of benefits hinders an eligible recipient in appealing his termination, and thus runs counterproductive to the Division's interest in insuring the payment of benefits to all eligible unemployed workers. Funds are necessary to enable the recipient to contact witnesses, gather evidence, and possibly retain counsel to represent him at the hearing. *Cf.* Note, *Withdrawal of Public Assistance: The Right to a Prior Hearing,* 76 YALE L.J. 1234 (1967). As was again pointed out in *Goldberg, supra,* 402 U.S. at 264:

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79. *See* nn. 5 and 71, *supra.*

80. *See* ANNUAL REPORT at 1, 7.

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from . . . bureaucracy.[81]

The Court in *Goldberg* further recognized that the wrongful termination of welfare benefits breeds "societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." 397 U.S. at 265. This is even more true in the case of unemployment compensation, which has always been considered a worker's earned "contractual right." *See Java, supra,* 402 U.S. at 131; Div.Br. at 14.

The Division suggests that prior evidentiary hearings will result in "complete chaos," Div.Br. at 19, and the Indiana employers predict a deluge of appeals resulting in the "wholesale abuse of the appeal process." Employer Br. at 11. The facts prove otherwise. The lower court's order has been in effect since October 27, 1971, and it has been complied with in a workable and efficient manner. Should the Division now wish to terminate a recipient, it merely affords him the opportunity to have benefit payments continued pending the Referee hearing already provided by statute which contains the due process elements specified in *Goldberg*. No fury of appeals has ensued; to the contrary, there has been an 8% *decrease* in the number of appeals requested by recipients. *Compare* U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar. 1972, Table 18 at 10 (May 1972) (764 appeals) with U.S. DEPARTMENT OF LABOR, MAN-

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81. Since the lower court's decision, the percentage of successful recipient appeals has increased. *Compare* U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar 1972, Table 18 at 10 (May 1972) (49.2% reversal rate) with U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar, 1971, Table 18 at 14 (June 1971) (45.7% reversal rate).

POWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar. 1971, Table 18 at 14 (June, 1971) (829 appeals).

Contrary to the assertions of amicus employers and California (EmployerBr. at 11, Cal.Br. at 2), the cost of holding prior evidentiary hearings is in no way prohibitive. Indeed, when compared to the *surplus* in the Employment Security Fund, the cost entailed by such due process hearings is .06%, a truly *de minimis* proportion.[82]

The Division's suggestion that the lower court's injunction requiring a "prior due process hearing" is "so vague as to be unenforceable" (Div.Br. at 16) is likewise erroneous. Throughout this litigation, all parties have treated the phrase "prior due process hearing" as meaning an evidentiary hearing containing the "rudimentary" procedures specified in *Goldberg*. The Division adopted this construction in complying with the lower court's order. In its transmittal letter directing compliance with the injunction, the Division stated:

> Effective immediately our procedures are being changed to comply with the Burney case. If a deputy arrives at a conclusion after a recorded fact finding interview, that a claimant's benefits should be termin-

82. In 1971, for example, 1474 claimants lost appeals before Division Referees. U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18a at 14 (May, 1972). Since many of these claimants were appealing from determinations denying initial eligibility, under the lower court's order they would not have been paid benefits pending a Referee hearing. However, even if all 1474 claimants were continued eligibility recipients and were paid benefits pending their Referee hearing, and if each of them received the maximum benefit of $45 for eleven weeks (the average period of continued eligibility, *see* ANNUAL REPORT at 55), the total amount of benefits paid would have been $729,630 ($45 x 11 weeks x 1474 claimants = $729,630). However, since 72% of all overpayments were recouped, the total unrecovered amount would have been $204,296. When this sum is compared with the surplus of $310,220,000.00 in the Employment Security Fund on December 31, 1971, *see* ANNUAL REPORT at 26, the resulting loss to the Fund would have been a mere .06%.

> ated, withheld, suspended, or reduced, for any reason other than earnings, after he has been determined eligible and paid benefits, the deputy will make a determination. . . . He will explain to the claimant that: (1) the matter will be referred to a referee for a due process hearing, and he, the claimant, will be advised of the date, time and location of the hearing, which he will be expected to attend, (2) that if the claimant does not wish to have a due process hearing, he may sign . . . a waiver of the hearing. In the event of (1) above, the deputy will prepare the appeal file in the normal manner and will not defer payments, explaining to the claimant that he will owe a refund if the decision of the referee is unfavorable.

Indiana Employment Security Division, Claims Manual Transmittal Letter No. 430. The Indiana Legislature has adopted a similar construction of the phrase "due process hearing." Indeed, the Legislature utilized the very phrase "due process hearing" in providing for the continuation of benefits to an employee pending a Referee hearing on an employer's appeal. IND. ANN. STAT. § 52-1542a(e) (Burns 1964 Repl., 1972 Supp.).

B

THE DIVISION'S ARGUMENTS FOR DISTINGUISHING GOLDBERG V. KELLY ARE INVALID.

1. Following the Initial Eligibility Determination, Both Unemployment and Welfare Recipients Occupy an Identical Eligibility Status.

The Division argues that *Goldberg* is inapplicable because of an alleged distinction between the "weekly" eligibility of unemployment compensation recipients and the "continued eligibility" of welfare recipients. Div.Br. at 15. To support this distinction, it contends "that affirmative duties are placed upon recipients of unemployment compensation benefits that are not placed on recipients in welfare programs." Div.Br. at 13. No such distinctions may properly be drawn.

The procedures used to award continuing benefits in the welfare and unemployment programs do not differ significantly. In both programs, recipients begin receiving regular benefits after an initial eligibility investigation, and thereafter are required to make periodic reports concerning their continued eligibility. An unemployment compensation recipient who has been found initially eligible for benefits is placed by the Division in a "continued claim" category and must report for an "interview" to review his status only once every five or ten weeks. MANUAL §§ 13725, 13727.[83] Welfare recipients likewise undergo periodic eligibility reviews, and are further responsible for immediately notifying the welfare department of any change of circumstances which may affect continued eligibility, including changes in living arrangements, income, property, composition of the household, or the school status of their children. INDIANA PUBLIC ASSISTANCE MANUAL, Chapter XI-A-1 and 2. Should questions arise concerning their continued eligibility, both unemployment compensation and welfare recipients are liable to have their benefits suspended indefinitely.[84]

Recipients in both programs must perform regular affirmative duties to maintain their continued eligibility. Unemployment compensation recipients must, for example, seek work, be available for work and report any change in work status or income. IND. ANN. STAT. § 52-1538b (Burns 1964 Repl. 1972 Supp.); § 52-1540 (Burns 1964 Repl.). All able bodied welfare recipients, except those having children under the age of six, are required to register for work, seek

83. To receive his check, an unemployment compensation recipient must also turn in a weekly payment voucher. MANUAL §§ 13600, 13610, 13620. In some instances, the voucher can be "executed" by mail. MANUAL § 13628. *See* n. 24, *supra*.

84. *See* note 25, *supra*.

and accept work, or, if unsuited for work, undergo job training, and report any change in status or income.[85]

The identical distinction betwen welfare and unemployment benefits urged by the Division in this case was emphatically rejected in *Crow v. California Department of Human Resources Development*, 325 F.Supp. 1314 (N.D. Cal. 1970). Holding that under *Goldberg v. Kelly, supra*, unemployment benefits may not be terminated without a prior evidentiary hearing, the court stated:

> Welfare and unemployment compensation schemes both involve an initial decision re eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision.

325 F.Supp. at 1319.

Whatever the labels, the duties, procedures, and requirements for continued eligibility in the unemployment compensation system closely resemble those in the welfare program. Surely the decision in *Goldberg* did not turn on labels. If the welfare department therein had employed identical procedures, but simply had used a different terminology,

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85. *See* Sec. 3 of the 1971 Amendments to Social Security Act, 1971 *Cong. and Admin. News* pp. 3966 *et seq.*; 37 *Fed. Reg.* 12204 (1972); IND. ANN. STAT. § 52-1241a (Burns 1964 Repl., 1972 Supp.); 4 IND. ADMIN. RULES & REGS. § (52-1244)-2 (Burns 1967, 1972 Supp.); IND. PUBLIC ASSISTANCE MANUAL, Chap. III-C-15, IV-B-21, XI-A-1 and 2.

In addition, in those states participating in the AFDC-U program (*see* note 45, *supra*), the "affirmative duties" of the AFDC-U recipient are more stringent than those required of the unemployment recipient. Not only must an AFDC-U recipient be available for and seeking employment, *see, e.g.* CAL. WELF. & INS. CODE § 11201 (West Supp. 1972), he also may not turn down any bona fide offer of employment without "good cause", regardless of its "suitability" 42 U.S.C. § 607(b)(1)(B).

In Goldberg v. Kelly, *supra*, plaintiff Lett's welfare benefits were specifically terminated for allegedly failing to report her current employment to the Department. *See* Kelly v. Wyman, 294 F.Supp. 893, 899-900 (S.D.N.Y. 1968) (three-judge court).

calling its periodic review of continued eligibility a "new eligibility determination" the result would not have been different. As this Court stated in *Bell v. Burson,* 402 U.S. 535, 541 (1971), "in reviewing state action in this area [of procedural due procees] . . . we look to substance, not to form, to determine whether constitutional minimums have been honored."

2. Holding an Evidentiary Hearing Prior to the Termination of Unemployment Benefits Does Not Affect Any Significant Employer Interests.

Indiana employers assert that their rights will be adversely affected by the payment of benefits pending an evidentiary hearing. Petition to File Amicus Brief at 3-4. This contention is wholly specious. Under the "experience rating" system, the amount of taxes assessed against an employer under the Employment Security Act does vary with the number of his former employees who are properly paid unemployment benefits. But should a former employee be found ineligible for benefits at a Referee hearing or an any subsequent stage, the employer's account is relieved of all charges for benefits improperly paid. IND. ANN. STAT. § 52-1537(d) (Burns 1964 Repl., 1972 Supp.). Thus, regardless of whether an employee is paid benefits pending an evidentiary hearing, his former employer suffers no monetary loss if the employee is ultimately determined to be ineligible. As Mr. Justice Douglas noted in his concurring opinion in *Java, supra,* 402 U.S. at 136:

> . . . an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is *not* charged with any benefits paid to his employee . . . . He has *no* responsibility for recoupment.

Any unrecouped overpayments resulting from the payment of benefits pending an evidentiary hearing to recipi-

ents eventually found to be ineligible are charged against the general Employment Security Fund, for which all of the state's thousands of employers are taxed on an equal basis.[86] The employer's financial interest in the general Fund is identical to that of any other category of taxpayers composed of less than the general public, such as homeowners paying property taxes or automobile owners paying automobile registration taxes. As this Court pointed out in *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951):

> Payments of unemployment compensation were not made to the employees by respondent [his former employer] but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

Moreover, considering the *de minimis* effect on the state's Employment Security Fund (.06%)[87] of the payment of benefits pending an evidentiary hearing, any concern about a possible future tax increase is entirely speculative.

Further as businessmen and citizens, the state's employers have an interest in assuring the payment of unemployment benefits to all eligible unemployed workers during

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86. "Even though the employers in the first instance pay the contribution . . . in the ultimate analysis it tends to rest upon the wage earner." Statement of Alvin H. Hansen, Chairman of Sub-Committee on Unemployment Insurance, Committee on Economic Security, *Hearings on S. 1130 Before the Sen. Comm. on Finance* 74th Cong. 1st Sess. 447 (1935); *see* dialogue between Senator (later Mr. Justice) Black and Senator Wagner, *id.* at 25; dialogue between Senator Black and Frances Perkins, *id.* at 117-18; Note, *Charity versus Social Insurance In Unemployment Compensation Laws*, 73 YALE L.J. 357, 361 (1963).

87. *See* n. 82, *supra*.

the "limited period" in which Congress intended benefits to be paid[88] Employer Br. at A9. Thus, like the Division, the employers interests are advanced by a pre-termination evidentiary hearing.

3. The Use of the Initial Eligibility "Informal Interview" to Terminate Unemployment Benefits Violates Due Process.

Notwithstanding the fact that the Division's procedure for determining *initial* eligibility lacks such *Goldberg* due process ingredients as timely and adequate notice, confrontation and cross-examination, an impartial decision-maker and a decision based solely on the legal rules and evidence adduced at the hearing, *see Goldberg, supra,* 397 U.S. at 267-71, the Division urges that this procedure may properly be used for *terminating* a recipient's continued unemployment eligibility. Div. Br. at 17-18. In so doing, the Division ignores the fact that a recipient of government benefits who has been certified as being initially eligible acquires greater procedural protections than an initial applicant whose statutory eligibility has never been official established. *Cf. Perry v. Sinderman,* .... U.S. ...., ..., 92 S.Ct. 2694, 2699 (1972); *Board of Regents v. Roth,* .... U.S. ...., ..., 92 S.Ct. 2701, 2708 (1972). Merely because a procedure suffices to establish initial eligibility, it does not follow *a fortiori* that it is constitutionally adequate to divest a recipient of a statutory entitlement that he previously has been enjoying. Indeed, the essence of the holding in *Goldberg v. Kelly,* 397 U.S. 254 (1970), is that a procedure used by welfare departments to establish initial eligibility violates due process when used to terminate a welfare recipient's continued eligibility.

The Court's decision in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971) that

88. Unemployment compensation was designed to stabilize the labor market and protect purchasing power—two distinct employer concerns. *See* Sections I-A-2b & c of this Brief, *supra.*

unemployment benefits may not be summarily suspended pending an employer's appeal in no way supports the use of the Division's initial eligibility "informal interview" to terminate continued unemployment benefits. *Java* dealt only with the process for establishing *initial* eligibility, not with the procedures required to terminate the continued receipt of benefits.

Indeed, while *Java* did not reach the due process issue,[89] the Court's opinion strongly suggests that due process requires an evidentiary hearing prior to the termination of unemployment benefits. In deciding the case on statutory grounds, the Court reviewed the issue of need in connection with the purposes of unemployment compensation, pointed out the "obvious" "importance of this case to workers,"[90] and stated:

> A kind of need is present in the statutory scheme for [unemployment] insurance . . . . since unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend" serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity.

Java, supra, 402 U.S. at 130-32.[91] Thus, *Java* not only fails to uphold the "informal interview" as a means of terminating unemployment benefits, it strongly suggests that such terminations fall within the purview of *Goldberg v. Kelly, supra.*

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89. *But see* California Department of Human Resources Development v. Java, *supra,* 402 U.S. at 136 (Douglas, J.) (concurring opinion).

90. 402 U.S. at 125.

91. *See also* concurring opinion of Mr. Justice Douglas, Java, *supra,* 402 U.S. at 136. In holding that the termination of unemployment benefits prior to an evidentiary hearing violated both due process and the Social Security Act, the three-judge district court in Java had stated:

CONCLUSION

In his concurring opinion in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisites of procedural due process." 395 U.S. at 342 (emphasis added). In *Goldberg, supra,* a prior evidentiary hearing was recognized as essential to protect welfare recipients from the arbitrary termination of benefits. While unemployment compensation and welfare bear striking resemblance to one another, Congress saw one basic distinction: Unlike welfare,[92] unemployment compensation was considered a worker's earned "contractual right"[93] to benefits which his labor helped to create.[94] In providing "subsistence" benefits to a worker "at a time when otherwise he would have nothing to spend,"[95] unemployment compensation serves the same purpose for the involuntarily unemployed as welfare serves for its beneficiaries. Surely due process and the Social Security Act provide unemployed workers with no

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> Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster-stricken that there is someone, somewhere worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in Kelly v. Wyman and the garnishee in Sniadach v. Family Finance Corp. . . . [citation omitted].

317 F.Supp. 875, 878 (N.D. Cal. 1970).

92. Prior to Goldberg, welfare benefits were often considered to be a "gratuity." *See* Goldberg v. Kelly, 397 U.S. 254, 261 n.8; *cf. id.* at 271 (Black, J.) (dissenting opinion).

93. Java, *supra,* 402 U.S. at 131-32; REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY 13 (1935).

94. *See* n. 86, *supra.*

95. Java, *supra,* 402 U.S. at 131-32.

less procedural protection than their counterparts in the public assistance programs.

The judgment below should be affirmed.

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Respectfully submitted,

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